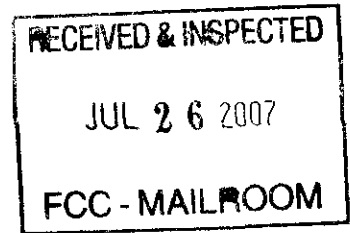




State of New Jersey
DEPARTMENT OF THE PUBLIC ADVOCATE
DIVISION OF RATE COUNSEL
31 CLINTON STREET ~ 11TH FLOOR
PO Box 46005
NEWARK NJ 07101



JON S. CORZINE
Governor

RONALD K. CHEN
Public Advocate
KIMBERLY K. HOLMES, ESQ.
Acting Director

July 25, 2007

DOCKET FILE COPY ORIGINAL

Via Overnight Delivery

Marlene H. Dortch, Secretary
Federal Communications Commission
E 9300 Hampton Drive
Capital Heights, MD 20743


**RE: I/M/O Petition for Waiver of Commission's Price Cap Rules for Services
Transferred from VADI to the Verizon Telephone Companies
WC Docket No.07-31, DA 07-2367**

Dear Secretary Dortch:

The New Jersey Department of the Public Advocate, Division of Rate Counsel ("Rate Counsel") hereby files a Reply to Verizon's Opposition in the above proceeding. Enclosed are an original and five copies. Please stamp one copy and return in the enclosed envelope.

Very truly yours,

Kimberly K. Holmes, Esq.
Acting Director

By: 
Christopher J. White, Esq.
Deputy Public Advocate

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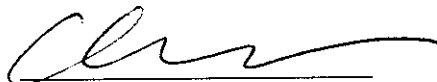
Michael E. Glover, Of Counsel
Edward Shakin
William H. Johnson
1515 North Courthouse Road
Suite 500
Arlington, VA 22201

Helgi C. Walker
Nicholas M. Holland
Wiley Rein LLP
1776 K Street, NW
Washington, D.C. 20008

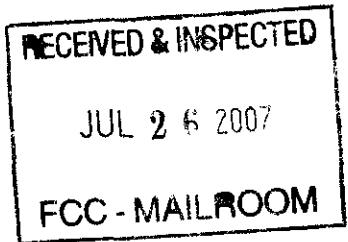
Albert M. Lewis
Chief, Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW,
Washington, D.C. 20554

Sam Feder, General Counsel
Federal Communications Commission
445 12th Street, SW,
Washington, D.C. 20554

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Christopher J. White, Esq.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554



In the Matter

Petition for Waiver of the Commission's
Price Cap Rules for Services Transferred
From VADI to the Verizon Telephone
Companies

WC Docket No. 07-31
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**REPLY OF THE NEW JERSEY DIVISION OF RATE COUNSEL
TO THE OPPOSITION OF VERIZON**

RONALD K. CHEN
PUBLIC ADVOCATE OF NEW JERSEY

KIMBERLY K. HOLMES, ACTING DIRECTOR
DIVISION OF RATE COUNSEL

Department of the Public Advocate
Division of Rate Counsel
31 Clinton Street, 11th Floor
P. O. Box 46005
Newark, New Jersey 07101
Tel: 973/648-2690
Fax: 973/624-1047

On the Application
Christopher J. White, Esq.
Deputy Public Advocate
James W. Glassen, Esq.
Assistant Deputy Public Advocate

July 25, 2007

Before the
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In the Matter

Petition for Waiver of the Commission's
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**REPLY OF THE NEW JERSEY DIVISION OF RATE COUNSEL
TO THE OPPOSITION OF VERIZON**

INTRODUCTION

The New Jersey Department of Public Advocate, Division of Rate Counsel ("Rate Counsel")¹ hereby files its Reply to the Opposition of Verizon. Rate Counsel filed an Application for Review of the Order issued by the Chief, Pricing Policy Division, Wireline

¹ / Effective July 1, 2006, the New Jersey Division of the Ratepayer Advocate is now Rate Counsel. The office of Rate Counsel is a Division within the New Jersey Department of the Public Advocate. The Department of the Public Advocate is a government agency that gives a voice to New Jersey citizens who often lack adequate representation in our political system. The Department of the Public Advocate was originally established in 1974, but was abolished by the New Jersey State Legislature and New Jersey Governor Whitman in 1994. The Division of the Ratepayer Advocate was established in 1994 through enactment of Governor Whitman's Reorganization Plan. See New Jersey Reorganization Plan 001-1994, codified at *N.J.S.A.* 13:1D-1, *et seq.* The mission of the Ratepayer Advocate was to make sure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that were just and nondiscriminatory. In addition, the Ratepayer Advocate worked to insure that all consumers were knowledgeable about the choices they had in the emerging age of utility competition. The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c. 155 (*N.J.S.A.* 52:27EE-1 *et seq.*). The Department is authorized by statute to "represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest," *N.J.S.A.* 52: 27EE-57, i.e., an "interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." *N.J.S.A.* 52:27EE-12; The Division of Rate Counsel, formerly known as the Ratepayer Advocate, became a division therein to continue its mission of protecting New Jersey ratepayers in utility matters. The Division of Rate Counsel represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates in Federal and state administrative and judicial proceedings.

Competition Bureau ("Bureau"), adopted and released on June 6, 2007, in which the Bureau granted Verizon's request for a limited waiver of section 61.42(g) for purposes of the 2007 annual access tariff filing² in a filing dated June 28, 2007. Verizon filed its Opposition July 13, 2007.

ARGUMENT

Verizon alleges that "NJRC's cookie-cutter Application for Review presents no new arguments or evidence, and simply rehashes the same arguments it has made in opposition to past Bureau decisions."³ The simple response to that statement is that for the past six years the Bureau has granted Verizon a waiver of section 61.42(g), without proper evidentiary support and in derogation of the rules as more fully set forth in Rate Counsel's Application for Review and nothing has changed. The same "cookie-cutter" argument could be made about the Verizon's petition, the evidence presented by Verizon in support of its petition and the serial waivers granted by the Bureau. All of which highlights and strengthens Rate Counsel's position that the Bureau lacks evidence on the record as to what effect including the VADI services into the price caps will have on ratepayers and whether the waiver is in the public interest. The same reasons have been proffered for the six years that these services have enjoyed annual waivers from price cap filing requirements. It is Verizon and the Bureau that have engaged in a "cookie-cutter" approach to this issue, not Rate Counsel.

²/ *I/M/O Petition for Waiver of the Commission's Price cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, WC Docket No. 07-31, Order adopted June 6, 2007 ("Order").

³ / Verizon Opposition at p.1.

1. There was insufficient evidence in this record for the Bureau to grant the 2007 Waiver.

Verizon relies upon the rationale granting the first⁴ of six serial waivers in justifying the Bureau's action in 2007 arguing a "relation back" doctrine. This simply highlights the fact there lacks an independent factual basis for the 2007 grant of a waiver and Verizon relies instead on the prior grants of serial waivers. In the 2002 Waiver the Bureau stated, "We are persuaded that Verizon has demonstrated good cause ... with respect to the June 2002 filing requirements only."⁵ That 2002 waiver has now been extended five additional years for a total of six, each referring back to the 2002 Waiver for reasoning.

At no point in this process has the Bureau demanded that Verizon produce evidence of the effect of the serial waivers to its customers, its prices or the public. There has been no explanation or attempt to explain the effects of the waiver. Instead, in each of the six successive waivers the explanation suggests that by the next year policies will be in place or litigation resolved ending the need for the waiver. While those may be good excuses, the Bureau must have adequate evidence from Verizon on the effect of the waiver, its relation to the regulations, effects upon customers, effects on the public interest and sufficient findings to show good cause for the waiver.

Verizon strains, through the use of sophistry, to argue changed circumstances with respect to the 2006 and 2007 waivers. However, this argument is a hollow argument for without the first four waivers there would be no "special circumstances" or need for additional time to transition customers in 2007. The facts Verizon uses to justify the continued use of serial waivers all emanate from the first and continuing waiver that should

⁴ / *Verizon Petition for Interim Waiver*, 17 FCC Rcd 11010 (2002) ("2002 Waiver")

⁵ / 2002 Waiver, ¶9.

never have been granted. The “special circumstances” that existed in 2002 cannot now be argued to still be compelling or sufficient to support the waiver of the rules sought by Verizon.

2. The Bureau lacks the authority to issue successive waivers.

Verizon’s claim that the Bureau has the authority to issue a waiver is undercut by the Commission’s recent action in *I/M/O Petition of AT&T, Inc. for Waiver of the Commission’s Rules to Treat Certain Local Number Portability Costs as Exogenous Costs Under Section 61.45(d)*.⁶ In that proceeding, the Commission issued the Waiver Order not the Bureau and it dealt with price cap regulation. Accordingly, the Bureau’s grant of serial waivers is evidence, in itself, of the Bureau exceeding its authority under the Commission’s rules.

The “special circumstances” cited by Verizon in support of the waiver demonstrate that there is no policy for handling this particular issue because the Bureau has resorted to serial waivers of the rules and such issues should be decided under Commission rules by the full Commission. The FCC itself, in addressing the waiver standard has found that the Commission will adhere strictly to its rules unless a party can demonstrate that in the public interest the rule should be waived.”⁷ Furthermore, the Commission may only waive a provision of its rules for “good cause shown.”⁸ In *Tandy Corporation*, the Commission reaffirmed that “the party petitioning the Commission for a waiver bears the burden of

⁶ / *I/M/O Petition of AT&T, Inc. for Waiver of the Commission’s Rules to Treat Certain Local Number Portability Costs as Exogenous Costs Under Section 61.45(d)*, CC Docket No. 95-116, FCC 06-97, Order (Rel. July 10, 2006).

⁷ / *In the Matter of Tandy Corporation, Walker Equipment Company, Ameriphone, Inc., and Ultratec, Inc., Request for Waiver of Volume Control Reset*, 47 C.F.R. §68.317(f), NSD-L-00-17, NSD-L-00-22 NSD-L-00-63, NSD-L-00-193, Memorandum Opinion and Order, (Rel. March 5, 2001), (“*Tandy Corporation*”), citing to *FPC v. Texaco Inc.*, 377 U.S. 33, 39 (1964).

⁸ / *Id* at 2. See also, 47 C.F.R. §1.3.

showing good cause: “[a]n applicant [for a waiver] faces a high hurdle even at the starting gate.”⁹ In addition, the Commission stated that “the Commission must take a “hard look” at applications for waivers¹⁰ and must consider all relevant factors when determining if good cause exists.”¹¹ The Commission further observed that “[F]inally, ‘[t]he agency must explain why deviation better serves the public interest, and articulate the nature of the special circumstances, to prevent discriminatory application and to put future parties on notice as to its operation.”¹² While it is well established that the Commission may waive any provisions of the rules, a waiver is “permissible where particular facts would make strict compliance inconsistent with the public interest.” *AT&T Corp., v. FCC.*¹³ The Commission concluded that “waivers were necessary to permit the LECs to correct the errors arising solely from their compliance with the staff’s legally deficient [RAO Letter 20] order.” Order, 20 F.C.C.R. at 7695. As the Court exhorted, “when the Bureau commits legal error, the proper remedy is one that puts the parties in the position they would have been in had the error not been made.”¹⁴ While the Rate Counsel agrees that the Commission has the discretion to grant waivers, it reemphasizes that Verizon has failed to submit empirical evidence to support its bare assertions of hardship, or that the grant of waiver is in the public interest.

⁹/ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

¹⁰/ *Id.*

¹¹/ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

¹²/ *Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹³/ *AT&T Corp., v. FCC*, 448 F. 3d 426, 433 (D.C. Cir. 2006), citing to *Northeast Cellular Tel. Co. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990).

¹⁴/ *AT&T v. FCC* at 433 (D.C. Cir. 2006), citing to *Exxon Co. v. FERC*, 182 F. 3d 30 (D.C. Cir. 1999) (quoting *Public Utils. Comm’n of Cal. v. FERC*, 988 F. 2d 154, 168 (D.C. Cir. 1993); See also, *I/M/O Petition of AT&T, Inc. for Waiver of the Commission’s Rules to Treat Certain Local Number Portability Costs as Exogenous Costs Under Section 61.45(d)*, CC Docket No. 95-116, FCC 06-97, Order (rel. July 10, 2006).

Therefore, regardless of how Verizon attempts to couch its argument, there is simply no basis for keeping any broadband loops, including those in Verizon's Tariff No. 20, free from price caps, and the lack of empirical support and evidence in the record precludes the Bureau from determining that a party has shown "good cause" to sustain a grant of Verizon's waiver. The Commission should vacate the Bureau's Order.

While the need for a waiver may demonstrate the lack of an established policy on this particular situation, the grant of successive waivers is a change in policy through the guise of a waiver. Policy changes are the province of the Commission, not the Bureau. In this case, six years of waivers demonstrate a new de facto policy. Rate Counsel's request for a suspension and accounting is a remedy the Commission can accommodate.

3. The relief sought by Rate Counsel is proper.

Contrary to Verizon's assertion, a Commission order directing the Bureau to suspend, investigate and issue an accounting Order for Verizon's 2007 annual access tariffs filing would certainly not be unlawful. Should the full Commission decide to vacate Verizon's request for a waiver, Verizon would have to re-file tariffs. The Commission is well within its statutory authority pursuant to 47 U.S.C. §204(a)(1), to suspend, investigate and issue an accounting Order for Verizon's 2007 annual access tariff filings. Verizon should be aware of a similar issue in connection with the use of an accounting rule, "add-back," in addressing rates charged by local telephone exchange carriers for access to their networks. In *Verizon Telephone Companies v. FCC*,¹⁵ Verizon unsuccessfully argued that the FCC unreasonably required Verizon's 1993 and 1994 tariffs to comply with the add-back rule for those years

¹⁵ / *Verizon Telephone Companies v. FCC*, 453 F. 3d 487 (D.C. Cir. 2006).

after those tariffs were filed. The Court found that the Commission had reasonably applied its “quasi-legislative authority,”¹⁶ finding that “Congress had expressly authorized the FCC to do what petitioners urge it cannot: suspend petitioner’s tariffs upon their filing, subject petitioners to an accounting order to track revenue earned under the tariffs, and determine at a later date whether petitioners’ tariffs contain “just and reasonable” rates.”¹⁷

Verizon’s assertion that once a tariff is “deemed lawful” the Commission cannot issue an investigation and issue an accounting Order is also wrong. Courts have long drawn a distinction between what constitutes “legal” and “lawful” tariffs.¹⁸ A *lawful* tariff is a tariff that is not only legal, but also contains rates that are “just and reasonable” within the meaning of 47 U.S.C. § 201(b) and filed pursuant to 47 U.S.C. § 204(a)(1), § 205, § 208 and § 204(a)(3). *See also, Virgin Islands Telephone Corp., v. FCC.*¹⁹ While carriers charging rates under a “lawful tariff” are immunized from refund liability,²⁰ as refunds would be an impermissible form of retroactive ratemaking, other prospective remedies are available against carriers charging “lawful tariffs” which are later found to be unreasonable.²¹ *See, Verizon Telephone Co. v. FCC; and Virgin Islands Telephone Corp., v. FCC.* Any necessary adjustments can be made as part of Verizon’s 2008 annual access tariff filing.

¹⁶ / *Id.*, at 498, citing to, *Global NAPs, Inc., v. FCC*, 247 F.3d 252, 259 (D.C. Cir. 2001); *See also* 47 U.S.C. §204(a)(1).

¹⁷ / 47 U.S.C. §204(a)(1).

¹⁸ / *Arizona Grocery Co., v. Atchinson, Topeka, & Santa Fe Ry. Co.*, 284 U.S. 370, at 384 (1932).

¹⁹ / *Virgin Islands Telephone Corp., v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006).

²⁰ / *ACS of Anchorage*, 290 F.3d 403, 411 (D.C. Cir. 2002).

²¹ / *Virgin Islands Telephone Corp., v. FCC*, 444 F.3d 666 (D.C. Cir. 2006).

Verizon also argues that the Commission cannot grant the relief Rate Counsel seeks as the access tariff was not suspended by the Commission within the statutory time period. The fault with Verizon's reasoning is that the serial grant of waivers has a continuing impact on ratepayers. By the same reasoning of the Bureau in its grant of Verizon's request to treat unrecovered local number portability costs as exogenous costs²² the grant of serial waivers has continuing impact and the Commission can act, even upon a lawful tariff.²³ In both the Verizon and AT&T LNP cost waivers, the Bureau found that even though lawful tariffs were in place a remedy could be fashioned because of the continuing impact. Simply, Verizon cannot have it both ways and the Bureau cannot be inconsistent in its decisions. The Commission, where there is a continuing impact or relation back as Verizon argues, can act to remedy a wrong for the benefit of the ratepayer.

Finally, Verizon rejects Rate Counsel's arguments that the serial grants of waiver treat Verizon differently from other providers. Verizon's arguments are misplaced.

²² / *1/M/O Verizon's Petition for Waiver of the commission's Rules to Treat Unrecovered Local Number Portability costs as Exogenous Costs under Section 61.45(d)*. CC Docket No. 95-116, Adopted and Released September 14, 2006.

²³ / "As the commission has explained, LNP recovery beyond the past five-year recovery period is warranted where, as here, end users are continuing to benefit from LNP beyond this period." *AT&T LNP Exogenous Cost Waiver Order*, 21 FCC Rcd at 8085-86, para. 18.

CONCLUSION

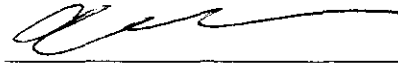
Rate Counsel urges that the Commission to reject the misplaced argument raised by Verizon and grant the relief requested in the Application for Review.

Respectfully submitted

RONALD K. CHEN
PUBLIC ADVOCATE OF NEW JERSEY

KIMBERLY K. HOLMES
ACTING DIRECTOR
DIVISION OF RATE COUNSEL

By:



Christopher J. White, Esq.
Deputy Public Advocate
James W. Glassen, Esq.
Assistant Deputy Public Advocate

Dated: July 25, 2006